

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
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March 12, 2004

Opinion No. 04-042

Legality of Lottery Pool

QUESTIONS

1. Is it lawful for a company to manage a lottery pool in Tennessee? The pool would be a group of persons who collectively contribute to the purchase of Tennessee Education Lottery Corporation tickets and who share in the proceeds of any lottery winnings attributable to those tickets. The company would charge a flat management fee to each member in the pool in addition to the cost of the lottery tickets, buy and retain ownership of all lottery tickets purchased on behalf of the pool members, and distribute the proceeds of lottery winnings to pool members.

2. Would such a company be a “lawful business transaction” exempt from the state gambling laws under Tenn. Code Ann. § 39-17-501(1)(A)?

OPINIONS

1. The proposed arrangement, in effect, would allow a business that is not qualified as a lottery retailer to sell lottery tickets. By charging a service fee in addition to the price of the tickets, the business would also be able to circumvent the statutory limits on retailer commissions. The proposed arrangement, therefore, is prohibited under the state gambling laws.

2. No.

ANALYSIS

This opinion concerns whether the Tennessee criminal laws on gambling would prohibit a company from operating a lottery pool. The request describes the pool as follows. A group of persons would collectively contribute to the purchase of Tennessee Education Lottery Corporation tickets and share in the proceeds of any winnings from those tickets. The company conducting the pool would charge a flat management fee to each member in the lottery pool in addition to the cost of the lottery tickets, buy and retain ownership of all lottery tickets purchased on behalf of the pool members, and distribute the proceeds of lottery winnings to pool members. The request indicates that the pool would operate in a manner similar to “PowerPick, Inc.” described in *United States Postal Service v. Amada*, 200 F.3d 647 (9th Cir. 2000).

A definitive answer, of course, would depend on the particular organization and its method of operation. Further, enforcement of the gaming statutes and lottery prohibitions is the responsibility of the independent District Attorneys General. The ultimate decision whether to prosecute under these statutes, based upon any particular factual situation, would rest with the District Attorney General in the appropriate judicial district. We assume that, like PowerPick, Inc., described in the case above, the company operating the pool would assign participants randomly to a pool and pick the sets of numbers to play for each pool by a random computer program. The request states that, if a pool wins a jackpot or other large prize, the company would give the state lottery the names of the pool participants for distribution of the prize money. For smaller prizes, the company would collect the winnings and divide them equally among the pool participants. As an initial matter, we note that the Tennessee Education Lottery Corporation has adopted game rules and regulations providing that the Corporation will only issue one prize check. TEL Policy Manual § 3.04E.5 (instant ticket game rules) & § 3.1.4.C.2 (on-line game rules). The Corporation, therefore, would refuse to distribute any prize among participants as directed by a pool.

Article XI, Section 5 of the Tennessee Constitution, as recently amended, provides in relevant part:

The legislature shall have no power to authorize lotteries for any purpose, ***and shall pass laws to prohibit the sale of lottery tickets in this state, except that the legislature may authorize a state lottery*** if the net proceeds of the lottery's revenues are allocated to provide financial assistance to citizens of this state to enable such citizens to attend post-secondary educational institutions located within this state.

(emphasis added). Thus, the Tennessee Constitution contains a general mandate to the legislature to prohibit the sale of lottery tickets in Tennessee “*except that the legislature may authorize a state lottery*” if certain conditions are met. Exceptions to general acts are strictly construed. *Carter v. Jett*, 51 Tenn. App. 560, 370 S.W.2d 576, 581 (1963), *cert. denied* (Tenn. 1963). Courts in other states have used rules of statutory construction when construing a state constitution. *See, e.g., Kottel v. State*, 312 Mont. 387, 60 P.3d 403, 407 (Mont. 2002); *Matter of Retirement Benefits of Yetka*, 554 N.W.2d 85, 91 (Minn. Ct. App. 1996).

Under Tenn. Code Ann. § 39-17-502(a), a person commits an offense who knowingly engages in gambling. Under Tenn. Code Ann. § 39-17-503, a person commits an offense who knowingly induces or aids another to engage in gambling and intends to derive or derives an economic benefit other than personal winnings from the gambling; or participates in the gambling and has, other than by virtue of skill or luck, a lesser risk of losing or greater chance of winning than one or more of the other participants. Aggravated gambling promotion and possession of a gambling device or record are also crimes under state law. Tenn. Code Ann. §§ 39-17-504 & -505.

Key to all these statutes is the definition of “gambling” that they prohibit. Tenn. Code Ann. § 39-17-501(1) provides in relevant part:

(1) Gambling is contrary to the public policy of this state and means risking anything of value for a profit whose return is to any degree contingent on chance, or any games of chance associated with casinos, including, but not limited to, slot machines, roulette wheels and the like. *For the purposes of this chapter gambling does not include:*

(A) A lawful business transaction;

* * * *

(C) *A state lottery of the type such as is in operation in Georgia, Kentucky, and Virginia in 2000 and authorized by amendment to the Constitution of Tennessee, if such lottery is approved by the general assembly;*

(emphasis added). “Lawful business transaction,” as used in the statute, includes any futures or commodities trading. Tenn. Code Ann. §39-17-501(4).

The proposed business would involve individuals buying shares in a pool of state lottery tickets, in return for a share of the winnings. Players, therefore, will risk their funds for a chance at a share of lottery winnings. This activity is “gambling” within the meaning of the statute unless it falls within an exception.

It is also a crime to make or aid in the making of any lottery. Tenn. Code Ann. § 39-17-506. “Lottery” means the selling of anything of value for chances on a prize or stake. Tenn. Code Ann. § 39-17-501(5). For the purposes of this statute, “makes or aids in the making of any lottery” does not include:

(1) Ownership or possession in this state of a lottery ticket originating from another state in which a lottery is lawful, if such ticket is not owned or possessed for the purpose of resale; provided, however, that ***nothing in this subdivision (a)(1) shall be construed as preventing the sale of lottery tickets or shares under the authority of the Tennessee Education Lottery Corporation;*** or

(2) The Tennessee Education Lottery operated pursuant to title 4, chapter 51, part 1.

Tenn. Code Ann. § 39-17-506(a)(1) & (2) (emphasis added). Again, the proposed activity meets the definition of a lottery prohibited under state law unless it falls within an exception. In each case, state law generally prohibits possession of a gambling device; promoting gambling; or making or

aiding in the making of any lottery. The statutes include exceptions to the general prohibition. As discussed above, statutory exceptions must be narrowly construed.

Tenn. Code Ann. §§ 4-51-101, *et seq.*, establish the Tennessee Education Lottery Corporation (the “Corporation”), which is authorized to initiate, supervise and administer the operation of the state lottery in accordance with the provisions of the statute. Tenn. Code Ann. § 4-51-105(a)(6). Under the statutory scheme, lottery tickets may be sold by the Corporation directly. Tenn. Code Ann. § 4-51-105(a)(18). The statute also authorizes the sale of lottery tickets by qualified lottery retailers. The statute provides:

The general assembly recognizes that to conduct a successful lottery, the corporation must develop and maintain a state-wide network of lottery retailers that will serve the public convenience and promote the sale of tickets or shares and the playing of lottery games while ensuring the integrity of the lottery operations, games, and activities.

Tenn. Code Ann. § 4-51-115(a). Lottery retailers receive a commission of six and one-half percent of gross sales. Tenn. Code Ann. § 4-51-115(c)(1). The Corporation may provide for other forms of compensation for services rendered by lottery retailers relating to the sale of lottery tickets or shares. Tenn. Code Ann. § 4-51-115(c)(2). The Corporation is authorized to develop criteria for qualifying lottery retailers, including several specified in the statute. Tenn. Code Ann. § 4-51-115(f). Lottery retailer contracts are not transferable or assignable. Tenn. Code Ann. § 4-51-117.

Lottery tickets or shares may only be sold for cash, and not by check, credit card, charge card, or any form of deferred payment. Tenn. Code Ann. § 4-51-108(a)(2). Section 4-51-122 of the statute lists other restrictions on the sale of lottery tickets. These restrictions are also contained in the state’s criminal laws. Thus, under Tenn. Code Ann. § 39-17-604, it is an offense for a person, other than a certified state lottery retailer, to sell a state lottery ticket or share, or to sell a state lottery ticket or share at a price other than face value. It is also an offense for a state lottery retailer to sell state lottery tickets or shares at a location other than the location listed on the retailer’s certificate of authorization. “Share” means any intangible evidence of participation in a lottery game. Tenn. Code Ann. § 4-51-102(18). “Ticket” means any tangible evidence issued by the lottery to provide participation in a lottery game. Tenn. Code Ann. § 4-51-102(19). “Lottery,” “lotteries,” “lottery game,” or “lottery games” are defined as any game of chance approved by the board of directors of the Tennessee Education Lottery Corporation and operated under Tenn. Code Ann. §§ 4-51-101, *et seq.*, including, but not limited to, instant tickets, on-line games, and games using mechanical or electronic devices. Tenn. Code Ann. § 4-51-102(8). The statute excepts cases where the chief executive officer of the Tennessee Education Lottery Corporation has provided written pre-authorization for the ticket price or the sale location. It is an offense for any person, including a state lottery retailer, to sell a state lottery ticket or share to any person under eighteen years of age. Tenn. Code Ann. § 39-17-602.

In our opinion, a lottery pool like the one described in the request would violate state laws regarding gambling, aiding in a lottery, and restricting the sale of Tennessee state lottery tickets. The Tennessee Constitution allows a state lottery as authorized by the General Assembly. Similarly, the state criminal laws against gambling and aiding in a lottery except activity connected with the Tennessee state lottery as authorized by the General Assembly. These exceptions incorporate all the limits on the sale of lottery tickets set forth in Tenn. Code Ann. §§ 4-51-101, *et seq.* The proposed arrangement, in effect, would allow a business that is not qualified as a lottery retailer to sell lottery tickets. By charging a service fee in addition to the price of the tickets, the business would also be able to circumvent the statutory limits on retailer commissions and the prohibition against selling a ticket for a price other than its face value. The proposed arrangement, therefore, is prohibited under state law.

The Office of the Virginia Attorney General reached a similar conclusion in 1991. *Op. Va. Att’y Gen.* 288 (April 2, 1991). There, the Virginia Attorney General considered whether a corporation could act as a “pooling agent” for anyone purchasing Virginia lottery tickets or shares of the tickets. The agent would accept cash from players and purchase a pool of the tickets. The agent would also charge a fixed fee in advance to each player for its services. The agent had not been licensed as a lottery sales agent by the Virginia Lottery Department. The Attorney General concluded that the proposed activities fell within the definition of gambling prohibited by state criminal law and that it did not come within the exemption for the state lottery because that exception incorporated the provisions of the state lottery law. That law provided that tickets could be sold only by a licensed agent and at the price established by the lottery department. The Attorney General concluded that the proposed arrangement would violate both of these requirements.

Similarly, the California Attorney General concluded that, under state law, a person may not, on behalf of another, purchase California state lottery tickets from an authorized retailer and charge a fee for the services rendered. *Op. Cal. Att’y Gen.* 98-1103 (May 5, 1999). The Attorney General concluded that the arrangement did not fall within state law expressly authorizing a lottery “pool” of multiple purchasers of a lottery ticket. The Attorney General also relied on a series of state cases interpreting state parimutuel betting laws. *See, e.g., Advanced Delivery Service, Inc. v. Gates*, 228 Cal. Rptr.557, 183 Cal. App.3d 967 (1986) (parimutuel betting law prohibited a contract under which a messenger service would purchase parimutuel tickets at a horse racing track on behalf of a bettor, and charge the bettor an additional fee for the messenger service).

United States Postal Service v. Amada, 200 F.3d 647 (9th Cir. 2000), referred to in the opinion request, is not applicable. In that case, the Court of Appeals for the Ninth Circuit found that a lottery ticket pooling service was not a “lottery” within the meaning of a federal statute authorizing the postal service to control the use of mail to prevent impermissible lotteries. The pool purchased Arizona lottery tickets and sold shares in the pool to participants. The Court found that the statute exempted official state lotteries, and that the lottery pool was not itself a separate lottery from the Arizona state lottery. The Court did not address whether the arrangement violated applicable Arizona state law regarding the sale of lottery tickets.

The request also asks whether a lottery pool would be exempt from the prohibition on gambling as a “lawful business transaction” under Tenn. Code Ann. § 39-17-501(1)(A). “Lawful business transaction,” as used in the statute, includes any futures or commodities trading. Tenn. Code Ann. §39-17-501(4). The statute provides no further definition for this term. We think it was intended to include transactions that, like futures or commodities trading, are authorized and regulated by other statutory schemes. A lottery pool does not fall within this class of transactions.

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